# (Billing Code 5001-06)

## DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750-AI30

Defense Federal Acquisition Regulation Supplement: Flowdown of Specialty Metals Restrictions (DFARS Case 2014-D011)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify the flowdown requirements for the DFARS clause entitled "Restriction on Acquisition of Certain Articles Containing Specialty Metals."

DATES: Comment date: Comments on the proposed rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2014-D011, using any of the following methods:

o <u>Regulations.gov</u>: <u>http://www.regulations.gov</u>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2014-D011" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that

corresponds with "DFARS Case 2014-D011." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2014-D011" on your attached document.

- o  $\underline{\textit{E-mail}}$ :  $\underline{\textit{osd.dfars@mail.mil}}$ . Include DFARS Case 2014-D011 in the subject line of the message.
  - o Fax: 571-372-6094.
- o <u>Mail</u>: Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <a href="http://www.regulations.gov">http://www.regulations.gov</a>, including any personal information provided. To confirm receipt of your comment(s), please check <a href="http://www.regulations.gov">www.regulations.gov</a>, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6106.

# SUPPLEMENTARY INFORMATION:

## I. Background

The clause at DFARS 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, as prescribed

at DFARS 225.7003-5(a)(2), implements 10 U.S.C. 2533b. This clause is used in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that exceed the simplified acquisition threshold and require the delivery of the following items, if such items contain specialty metals: aircraft, missile or space systems, ships, tank or automotive systems, weapon systems, or ammunition, and components thereof. Except as provided in paragraph (c) of the clause, any specialty metals incorporated in items delivered under the contract shall be melted or produced in the United States, its outlying areas, or a qualifying country.

DoD is proposing to revise paragraph (e) of this clause to clarify the requirement to flow this clause down to subcontracts.

# II. Discussion and Analysis

In order to prevent misinterpretation of the current flowdown requirement to insert the "substance of the clause" in subcontracts, the flowdown requirement has been rewritten to specify that the only modifications allowed when flowing down the clause are as follows:

- Exclude and reserve paragraph (d) of the clause.
- Modify paragraph (c)(6) of the clause only as necessary to facilitate management of the allowance for up to 2 percent

otherwise noncompliant specialty metal content in the end product, while recognizing that the minimal content exception does not apply to specialty metals contained in high-performance magnets.

• Not further alter the clause, other than to identify the appropriate parties.

## III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## IV. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et

seq., because it is a clarification of an existing requirement.

However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The reason for issuance of this proposed rule is to clarify the flowdown requirements for DFARS clause 252.225-7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

The objective of the rule is to more fully implement the requirements of 10 U.S.C. 2533b, which restricts the acquisition of specialty metals not melted in the United States, its outlying areas, or a qualifying country, in order to strengthen the United States industrial base.

This rule applies to DoD contractors and subcontractors that are providing aircraft, missile or space systems, ships, tank or automotive items, weapon systems, ammunition, or components thereof that contain specialty metals.

Based on FY 2013 data in the Federal Procurement Data System (FPDS), DoD awarded 1,566 contracts that exceeded the simplified acquisition threshold for aircraft, missile or space systems, ships, tank or automotive items, weapon systems, ammunition, or components thereof. Of those awards, 642 were to 533 unique small business entities. FPDS does not contain data on subcontracts. If we estimate an average of 20 subcontracts per contract for items containing specialty metals, and that 35

percent of those subcontracts are awarded to small businesses, 2 subcontracts per small entity, then this rule may apply to approximately 6,123 small business entities subject to DFARS 52.225-7009.

 $(1,566 \times 20 = 31,320 \times .35 = 10,962 \times .5 = 5,481 \text{ small business}$ subcontractors + 642 small business prime contractors = 6,123)

There are no reporting or recordkeeping requirements associated with this rule. With some exceptions, the rule requires contractors to provide certain end products containing specialty metals melted or produced in the United States, its outlying areas, or a qualifying country. However, end items may contain a minimal amount of otherwise noncompliant specialty metals, if the total weight of such noncompliant metals does not exceed 2 percent of the total of all specialty metals in the end item. Therefore, the contractor has some discretion in flowing down the requirement to subcontractors to the extent necessary to ensure compliance of the end products the contractor will deliver to the Government.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any alternatives to this rule that would reduce burdens on small entities and meet the objective of the rule. This rule does not impose any significant new burdens on small entities, because it only clarifies what was intended by

the conventional statement to insert "the substance of the clause" in subcontracts for items containing specialty metals.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2014-D011), in correspondence.

# V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

# List of Subjects in 48 CFR Part 252

Government procurement.

# Amy G. Williams,

# Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is proposed to be amended as follows:

# PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

- 2. Amend section 252.225-7009 by-
- a. Removing the clause date "(JUN 2013)" and adding "(DATE)" in its place; and
- b. Revising paragraph (e) to read as follows:

# 252.225-7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals

\* \* \* \* \*

# (e) Subcontracts.

- (1) The Contractor shall exclude and reserve paragraph (d) and this paragraph (e)(1) when flowing down this clause to subcontracts.
- (2) The Contractor shall insert paragraphs (a) through (c) and this paragraph (e)(2) of this clause in subcontracts, including subcontracts for commercial items, that are for items containing specialty metals to ensure compliance of the end products that the Contractor will deliver to the Government. When inserting this clause in subcontracts, the Contractor shall—
- (i) Modify paragraph (c)(6) of this clause only as necessary to facilitate management of the minimal content exception at the prime contract level. The minimal content exception does not apply to specialty metals contained in high-performance

magnets; and

 $\hbox{(ii)}\quad \mbox{Not further alter the clause other than to identify} \\$  the appropriate parties.

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